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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 753

WESTINGHOUSE BROADCASTING COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 104a–123a)[1] are reported at 36 T.C. 912. The opinion of the court of appeals (Pet. App. 4a–11a) is reported at 309 F. 2d 279.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1962 (Pet. App. 4a). The petition for a writ of certiorari was filed on January 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Record references are to the appendix to the petitioner's brief in the court of appeals.

QUESTION PRESENTED

Whether the record supports the finding of both courts below that the taxpayer's automatically renewable network affiliation contract had an indefinite useful life as of the close of 1953 and 1954 and was therefore not a depreciable asset during those years.

STATUTES AND REGULATIONS INVOLVED

Relevant portions of Section 23(l) of the Internal Revenue Code of 1939, Section 167(a) of the Internal Revenue Code of 1954, Sections 39.23(l)–3 and 39.23 (l)–5 of Treasury Regulations 118 (1939 Code), and Sections 1.167(a)–3 and 1.167(b)–0 of Treasury Regulations on Income Tax (1954 Code) are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

On June 1, 1953, Westinghouse Broadcasting Company, Inc. (taxpayer), purchased from the Philco Corporation (Philco) all the assets of television station WPTZ in Philadelphia, including its two-year network affiliation contract with National Broadcasting Company (NBC) which was to expire on January 1, 1954.[2] The aggregate purchase price was $8,534,025.94; of this, $5,000,000 was allocated to the network affiliation contract. (R. 105a–106a, Pet. App. 5a.) The network affiliation contract was renewable automatically for successive two-year terms unless, at least ninety days prior to the expiration of any two-

[2] Federal Communications Commission regulations in effect during 1953 and 1954 prohibited any contract providing for network affiliation for a term longer than two years. 47 C.F.R. (Rev. 1953), Sec. 3.658(c).

year term, either party sent the other written notice of its intention not to renew (R. 115a, Pet. App. 5a).[3] The contract had been entered into originally between NBC and Philco's assignor on November 23, 1949, for a two-year term commencing January 1, 1950, and had been automatically renewed on January 1, 1952, for a further two-year term expiring January 1, 1954. Taxpayer commenced operation of station WPTZ on June 1, 1953, and the affiliation contract was automatically renewed again on January 1, 1954, for a two-year term expiring January 1, 1956. (R. 109a–110a, Pet. App. 6a.)

In September 1954, NBC informed taxpayer that it desired to acquire a television station in Philadelphia. Shortly thereafter negotiations were undertaken looking to the possibility of transferring WPTZ and taxpayer's Philadelphia radio station to NBC in exchange for NBC's television and radio stations in Cleveland; taxpayer was advised by NBC that, if the Philadelphia-Cleveland transaction was not consummated, it would terminate the affiliation agreement with respect to WPTZ (R. 110a, Pet. App. 6a). Subsequently, in May 1955, taxpayer and NBC did enter into an agreement providing for the Phila-

[3] The renewal provision reads as follows (R. 109a–110a, Pet. App. 5a):

> This agreement * * * shall remain in effect for a period of two years. It shall then be renewed on the same terms and conditions for a further period of two years, and so on for successive further periods of two years each unless and until either party shall, at least three months prior to the expiration of the then current term, give the other party written notice that it does not desire to have the contract renewed for a further period.

delphia-Cleveland station exchange (plus a payment by NBC of $3,000,000); the actual exchange took place on January 21, 1956 (R. 111a, Pet. App. 6a).

On its federal income tax returns for 1953 and 1954, taxpayer took depreciation with respect to the network contract on the basis of a 55-month useful life (consisting of the seven-month term in existence on June 1, 1953, plus two renewal terms of 24 months each) on its assumption that network affiliation contracts may normally be expected to be renewed twice. After the Commissioner proposed a deficiency for these two years, taxpayer brought this suit in the Tax Court. There taxpayer alternatively contended that the contract had a 31-month useful life. Upon its consideration of the evidentiary facts, the Tax Court found that the contract had an indeterminable useful life as of the close of 1953 and 1954 and hence was not subject to depreciation during those years. The court of appeals affirmed on the ground that the taxpayer had failed to prove that the duration of the contract was sufficiently determinable, as of the relevant dates, to permit depreciation during the years involved (Pet. App. 4a–11a).

ARGUMENT

The ultimate question is a factual one confined to the evidence of record. The decision below is correct and, contrary to taxpayer's assertions, no conflict of decisions or important question is involved.

1. The applicable Treasury Regulations provide that an intangible asset is not subject to the statutory allowance for depreciation unless it has a definitely limited useful life capable of reasonable ascertain-

ment from facts known at the close of the taxable year for which the allowance is claimed. See Treasury Regulations 118, Section 39.23(l)-3; Treasury Regulations on Income Tax (1954 Code), Section 1.167(a)-3, Appendix, *infra*, pp. 9, 10–11. The burden of proving the useful life of an asset and the reasonableness of the depreciation deduction is upon the taxpayer. See Treasury Regulations 118, Section 39.23(l)-5; Treasury Regulations on Income Tax (1954 Code), Section 1.167(b)-0, Appendix, *infra*, pp. 10, 11. To the same effect, see *Union Electric Co.* v. *Commissioner*, 177 F. 2d 269, 273 (C.A. 8); *Thriftichack Service Corp.* v. *Commissioner*, 287 F. 2d 1 (C.A. 2).

In the present case both courts below concluded, from the evidence, that taxpayer had failed to prove that the network affiliation contract had a determinable useful life during the tax years in question (R. 113a–121a; Pet. App. 4a–11a). That finding is final and will not be reviewed by this Court in the absence of a very exceptional showing of error. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51. Taxpayer does not assert error, exceptional or otherwise, in relation to the factual inquiry.

2. Petitioner contends (Pet. 8–11) that the decision below is in conflict with other court of appeals' decisions, one of them dealing with amortization of the costs of leaseholds, *Bonwit Teller & Co.* v. *Commissioner*, 53 F. 2d 381 (C.A. 2), certiorari denied, 284 U.S. 690, and the others with baseball player contracts, *Commissioner* v. *Pittsburgh Athletic Co.*, 72

F. 2d 883 (C.A. 3); *Commissioner* v. *Chicago National League Ball Club*, 74 F. 2d 1010 (C.A. 7); *Helvering* v. *Kansas City American Ass'n Baseball Co.*, 75 F. 2d 600 (C.A. 8). The contention is without substance.

The *Bonwit Teller* case involved a 21-year lease on improved real estate containing an option to renew at a rental to be determined by an appraisal of the property at the time of renewal. The baseball player contract cases involved the standard one-year player contracts providing for renewal by the club at a salary agreed upon by the parties.* In each of these cases the court decided that the costs attributable to the lease or contract should be amortized over its initial term, notwithstanding the possibility of a renewal. These decisions, however, have no application to the present case.

In the first place, the factors which in those cases argued most persuasively for viewing the contracts as primarily single-term arrangements are not present here. In those cases, renewal of the contract would necessarily be attended by renegotiation, see, *e.g.*, *Bonwit Teller & Co.* v. *Commissioner*, *supra*, 53 F. 2d at 383; *Commissioner* v. *Pittsburgh Athletic Co.*, *supra*, 72 F. 2d at 884; the contract in the present case calls for no renegotiation in connection with renewal. More important, in those cases the costs attributable to the contracts bore a direct relationship to the value of the contracts over their initial term, see, *e.g.*, *Bonwit Teller & Co.* v. *Commissioner*, *supra*, 53 F. 2d at

* In the event of failure to reach such an agreement, the player was given the choice of accepting the salary fixed by the club or not playing baseball for the club.

383; *Helvering* v. *Kansas City American Ass'n Baseball Co., supra*, 75 F. 2d at 604. That is clearly not the case here; it could not be seriously contended that the $5 million attributed in the purchase contract to the network agreement (see p. 2, *supra*) reflected the value of that agreement over a two-year term, considering, for example, that the station's total earnings before taxes had averaged only $1.7 million in each of the two years immediately preceding the sale (R. 108a).

In the second place, neither of the theories advanced by petitioner—the 31-month or the 55-month amortization (see p. 4, *supra*)—would result in the network contract's being depreciated in its initial term, which is all that was involved in the *Bonwit Teller* and baseball player contract cases. Of course the *initial* term of the network contract (January 1, 1950–December 31, 1951) had already expired when petitioner purchased the station (see p. 3, *supra*); furthermore, even if the matter is viewed prospectively as of the time of the purchase, petitioner's initial term was only the seven months remaining before December 31, 1953 (see p. 2, *supra*). Petitioner, recognizing the reasonable certainty that the contract would be renewed, has never contended that either of these periods would be appropriate for amortization of the cost of the agreement.

3. The asserted "probable" conflict with decisions of this Court (Pet. 12–14) is without substance. It is based on the premise that the decision below departs from the prior, consistent administrative interpretation of the depreciation provisions of the

various revenue acts. The fact is that the court below applied the regulations with respect to the depreciation of intangibles (Pet. 8a–10a), which reflect the administrative interpretation and which, as taxpayer correctly states (Pet. 13), have remained substantially the same ever since 1918. None of the numerous authorities cited by taxpayer (Pet. 13) is inconsistent, either from a legal or factual standpoint, with the result reached below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1963.

APPENDIX

Internal Revenue Code of 1939:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (l) [as amended by Sec. 121(c), Revenue Act of 1942, c. 619, 56 Stat. 798, 819] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—
>
> (1) of property used in the trade or business * * *.
>
> * * * * *

(26 U.S.C. (1952 ed.) 23.)

Internal Revenue Code of 1954:

> SEC. 167. DEPRECIATION.
>
> (a) *General Rule.*—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—
>
> (1) of property used in the trade or business * * *.
>
> * * * * *

(26 U.S.C. 167.)

Treasury Regulations 118 (1939 Code):

> § 39.23(l)–3 *Depreciation of intangible property.* Intangibles, the use of which in the trade or business or in the production of income is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses, and franchises. Intangibles, the use of which in the business or trade or in the production of

income is not so limited, will not usually be a proper subject of such an allowance. If, however, an intangible asset acquired through capital outlay is known from experience to be of value in the business or in the production of income for only a limited period, the length of which can be estimated from experience with reasonable certainty, such intangible asset may be the subject of a depreciation allowance, provided the facts are fully shown in the return or prior thereto to the satisfaction of the Commissioner. No deduction for depreciation, including obsolescence, is allowable in respect of good will.

* * * * *

§ 39.23(l)–5. *Method of computing depreciation allowance.* (a) * * * Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made. * * * The burden of proof will rest upon the taxpayer to sustain the deduction claimed. * * *

* * * * *

Treasury Regulations on Income Tax (1954 Code):

§ 1.167(a)–3 *Intangibles.*

If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the in-

tangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill. * * *

* * * * *

§ 1.167(b)–0 *Methods of computing depreciation.*

(a) *In general.* * * * The reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made. It is the responsibility of the taxpayer to establish the reasonableness of the deduction for depreciation claimed. Generally, depreciation deductions so claimed will be changed only where there is a clear and convincing basis for a change.

* * * * *

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